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No. 03-1007

IN THE
Supreme Court of the United States

FREEDOM NY, INC.,
Petitioner,

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *OF AMICUS CURIAE* THE HUBZONE CONTRACTORS NATIONAL COUNCIL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Federal Circuit erred when it departed, without explanation, from the established standards for review of credibility findings made by the Armed Services Board of Contract Appeals.

2. Whether the Federal Circuit erred when it misconstrued the impact of an integration clause on a contract Modification that was composed of two integrally related documents that, by their plain terms, were intended to be read together.

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OPINIONS BELOW

The decisions below consist of the opinion of the Court of Appeals for the Federal Circuit, reported at 329 F.3d 1320 (Fed. Cir. 2003); its opinion on Petition for Rehearing, 346 F.3d 1359 (Fed. Cir. 2003); and the decision of the Armed Services Board of Contract Appeals reported at 01-2 BCA ¶31,585.

INTEREST OF AMICUS [1]

Amicus Curiae, the HUBZone Contractors National Council (the Council) is a District of Columbia Nonprofit Corporation. Its principle goal is to insure that its membership receives the optimal benefits of the HUBZone Empowerment Contracting Program created by the HUBZone Act of 1997. This statute provides contracting assistance, including federal procurement set-asides, to qualified small businesses located in historically underutilized business zones (HUBZones) in an effort to create employment opportunities, investment, and economic development in those areas.

The Council seeks public policies which support, enhance and expand business opportunities for firms which have been certified as HUBZones by the Small Business Administration (SBA). Regular memberships in the Council are available to firms certified as HUBZone small business concerns by the SBA In order to be so certified, a small business must be 100% owned by U.S. citizens, have its

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3 Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the brief's preparation or submission.

principle place of business located in a HUBZone, and have at least 35% of its employees residing within a HUBZone.

INTRODUCTION

The Council supports the Petitioner's argument that the Court of Appeals for the Federal Circuit erred in its partial reversal and remand of the Armed Services Board of Contract Appeals' decision granting relief to the Petitioner.

The Council submits this brief in support of the Petition for a *Writ of Certiorari* to the Federal Circuit in order to make the Supreme Court aware of the importance of the decision below and its potential to do significant damage to a wide range of Government contractors, particularly small businesses that have the least resources available to effectively protect themselves against encroachments on their contractual rights by the government.

STATEMENT OF THE CASE

In 1983, the Petitioner, Freedom NY, Inc. (FNY) was awarded a contract by the Defense Logistics Agency (DLA) for the production of a variety of Meal, Ready To Eat (MRE) combat rations under DLA's Industrial Preparedness Producer Program. In 1987, the contract was terminated for default. Joint Appendix (JA) 372-74.

Thereafter, FNY submitted a claim in excess of $21 million against DLA alleging, among other things, that a series of egregious government breaches and constructive changes—including repeated unexcused failures to make full and timely progress payments, undue interference with contract performance, imposing performance standards higher than those specified in the contract, and improperly

recouping monies by withholding progress payments —had unduly hindered FNY's performance of the contract and ultimately forced it to cease doing business. (JA 27.)

1. The Armed Services Board of Contract Appeals Proceedings

FNY duly appealed the denial of its claim by the DLA to the Armed Services Board of Contract Appeals (ASBCA) and the case was assigned docket number 43965. In May,1996, the ASBCA ruled that the default termination of FNY's contract was improper. *Freedom NY, Inc. ASBCA No. 35671, 96-2 BCA ¶ 28,328.* JA 372-74. In August of 1996, the ASBCA vacated that part of its decision that had denied FNY's breach claim and reinstated appeal number 43965. *Freedom NY, Inc. ASBCA No. 35671, 96-2 BCA ¶ 28,502.*

Subsequently, in December, 2000 the parties mutually agreed upon the monies due FNY as its convenience termination settlement, subject to appropriate adjustment based upon the ASBCA's ruling in the pending appeal. In August, 2001 the ASBCA rendered a decision which held the government liable for multiple breaches and concluded that FNY was entitled to a contract price adjustment of $5,907,654, plus interest in excess of $4 million. *Freedom New York, Inc. ASBCA 43965, 01-2 BCA ¶31,585.* App. C pp. 98a-99a.

The ASBCA's decision, rendered after a trial lasting 11 days, was carefully and thoughtfully crafted by Judge James. It is 42 pages long, contains 133 detailed findings of fact and was reviewed and concurred in by the ASBCA's Acting Chairman and by one of its Vice Chairmen. A pivotal aspect of the decision relates to contract Modification 25, its contents and the circumstances of its execution.

Modification 25 was, in essence, a release executed by the parties in May, 1986. By its terms, FNY withdrew its claim of nearly $3.5 million against DLA, received some relief on the timing of deliveries for the undelivered balance of MREs, and agreed to several relatively insignificant price adjustments.

Modification 25 concluded with integration language stating, in part, that "the aforesaid recitals are the complete and total terms" of the parties' agreement and were entered into "free from duress or coercion."

Judge James found as a fact that Modification 25 had appended to it a May 13, 1986 side letter to DLA from FNY that was faxed by DLA contracting officer Bankoff to DLA headquarters for comment and review prior to the execution of Modification 25, and which was not objected to by any DLA officials. The side letter provided the rationale and conditions essential to explaining FNY's willingness to waive a its monetary claim against DLA. AR4, tab M25; ex. FT 280; tr. 643-51, 2047-49.

In sum, the side letter agreed to the waiver of FNY's claim subject to several express conditions, namely (a) negotiation of an additional "fair and reasonable" MRE contract based upon FNY 's "existing mobilization capacity;" (b) processing by DLA and FNY of a guaranteed loan; and (c) assistance to FNY in obtaining contracts under the 8(a) program.

The circumstances, as described above, surrounding Modification 25's execution and the side letter that fully described the parties' intent were attested to by FNY's President and corroborated by its chief consultant. Judge James found as a fact that FNY's President ". . .heard no objection to the 13 May letter, understood that [DLA

headquarters] had agreed and said that without DLA's agreement he would not have signed Modification No. P00025. Soon thereafter, Messrs. Thomas and Bankoff signed Modification No. P00025."

At the trial, Mr. Bankoff in the course of his lengthy, disjointed and rambling testimony, cavalierly denied all of the above events. He testified that, "there is no side agreement. There is no attachment to the modification." (App. G, p. 125a, 128a.) Judge James having had the opportunity to observe Mr. Bankoff throughout the proceedings and after listening to and observing him testify, categorically rejected his denials. Judge James found as a fact:

> "Considering the documents in evidence and Mr. Bankoff's demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous testimony, we attach no probative weight to Mr. Bankoff's denial of the 'side agreement' attached to P00025."

(App. C, p. 65a.)

Citing *Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980)* ("the Government cannot enforce the benefits of the settlement agreement against the contractor, and, at the same time, vary its obligations thereunder…."), Judge James concluded that DLA, " . . .cannot enforce the Modification No. P00025 release provision, since it did not fulfill its duties under the side agreement thereto." Accordingly, his decision, as discussed above, resulted in an award to FNY in excess of $10 million. (App. C, pp. 93a-94a.)

2. The Court of Appeals for the Federal Circuit Proceedings

The court of appeals (while affirming the ASBCA's rejection on the grounds of duress, of Modification 29 which is not at issue here) reversed and remanded the ASBCA's holding with respect to Modification 25. Its decision was, in essence, based upon its conclusion that the integration language contained in Modification 25 and mentioned earlier ("The above recitals are the complete and total terms" of the parties' agreement) was controlling and that therefore "Modification 25 was an integrated document to which no additional terms could be added through parol evidence . . ." (App. A, p. 17a.)

The court of appeals was similarly unpersuaded by the ASBCA's findings that Mr. Bankoff's testimony was not credible and that the side letter to Modification 25 was, in fact, transmitted to DLA for its review and comment prior to the execution of the Modification and, under the circumstances, formed a part of the Modification's terms and conditions. In its decision, the court twice referred to Bankoff's after-the-fact comments with respect to the side letter (he said "there is no side agreement. There is no attachment to the modification") the first time without making any reference to Judge James' finding that Bankoff had been disingenuous in his testimony before the ASBCA. (App. A pp. 17a-21a.)

The second time that it raised the subject, the court mentioned - without any specific comment - that the ASBCA had "credited" the testimony of FNY's President with respect to the circumstances surrounding the side letter and modification 25 and that the Board had rejected Bankoff's disavowals because of his " demeanor, persistently selective recall of facts and evasive, argumentative, and ambiguous

testimony." (App. A, pp. 1[illegible]a-21a *infra*.) Certainly, by its reversal and remand of th[illegible] ASBCA's conclusions with respect to Modification 2[illegible], the court disregarded the ASBCA's findings concern[illegible]ng FNY's side letter and its approval by DLA and the we[illegible]ght to be accorded to Bankoff's disclaimers.

Subsequently, FNY fi[illegible]ed a petition for rehearing with the court, arguing that the si[illegible]e letter constituted an integral part of Modification 25, was [illegible]so considered by the ASBCA, and should be confirmed as s[illegible]ch by the court of appeals.

The court rejected FNY's contention on three grounds:

First, that FNY had w[illegible]aived this argument since it did not raise it in its opening [illegible]brief. (App. B, p. 29a *infra*.) Obviously, since FNY was [illegible]the Appellee at the court of appeals, this ground is incorre[illegible]ct.

Secondly, the court opined that simply attaching one document to another—without more—does not bind the other party to the attached document's conditions. *Id.* We agree. In this case, however, the two documents formed part of one transaction (as the ASBCA specifically found). As the court, citing the Restatement (Second) of Contracts, §132 cmt. c (1981), noted in its opinion, "the documents must clearly indicate that the parties intended that they be considered together as a single document." This is precisely what occurred here and what was found as a fact by the ASBCA.

Third, the court misinterpreted the language used by FNY in the side letter which stated, in part, that, "It was agreed that the understandings reached on those matters were not appropriate for inclusion in the Mod[ification] but were

more appropriately to be addressed in a separate letter." The court concluded that this language expressly meant that the side letter was "not part of Modification 25"(emphasis in original). *Id. Amicus* strongly believes otherwise. The side letter was over three pages long and was not written in "legalese." The foregoing statement is readily susceptible to the interpretation that because of its length and more relaxed tone, the side letter was not appropriate for physical inclusion in the body of Modification 25 although even a cursory reading of the documents demonstrates that the Modification and the side letter were integrally related.

ARGUMENT

1. THE FEDERAL CIRCUIT'S DECISIONS MISAPPLIED THE STANDARD OF REVIEW APPLICABLE TO A BOARD OF CONTRACT APPEAL'S FINDINGS OF FACT.

Petitioner's brief has already ably discussed the misapplication by the court below of the standard of review to be applied to the ASBCA's findings of fact and its observations will not be repeated here. *Amicus* wishes only to underscore the seriousness of the court's error when, almost casually and without comment or explanation, it discredited the ASBCA's critical findings regarding the credibility of the DLA's Mr. Bankoff and the circumstances surrounding the approval and submission of the Modification 25 side letter.

Regrettably, the court below ignored this Court's instruction in *Anderson v. City of Bessemer City, 470 U.S. 564 (1985),* that where findings are based on a witness's credibility they are entitled to even greater than usual deference because only the trial judge who has personally observed a witness (such as Bankoff) "...can be aware of the

variations in demeanor and tone of voice that bear so heavily on a listener's understanding and belief in what was said." (470 U.S. at 571). Unfortunately, the court disregarded even stronger admonitions that mandate against disturbing a trial court's credibility findings, "unless those findings shock the conscience," *Golden Eagle Spotting Co., v. Brewery Drives and Helpers, Local Union 133, 93 F.3d 468 (8th Cir. 1996)*, or unless they are, "hopelessly incredible or self-contradictory," *Quazite Division of Morrison Molded Fiberglass Co. v. NLRB, 87 F. 3d 493(D.C. Cir. 1996).* Clearly, that was not the case here and just as clearly, the court's inexplicable dismissal of these key findings was without any sound legal basis and must be corrected.

2. THE FEDERAL CIRCUIT'S DECISIONS IGNORE SEVERAL TRADITIONAL RULES OF CONTRACT INTERPRETATION.

The ASBCA properly construed FNY's side letter as an integral part of Modification 25, duly reviewed and approved by DLA before the Modification was executed and thus not subject to any limitations that might be imposed by the Modification's integration language. This is made clear by a number of factors, including the side letter's reference: (a) to the parties' ongoing dispute, and (b) to the parties' tentative agreement to settle FNY's monetary claim against DLA. Moreover, the side letter, by its own terms, stated that it was part of Modification 25:

> Modification to be designated (the Mod) P00021 [2] . . have agreed to settle Freedom's claim against DLA . . . .That settlement is reflected in part in the contract modification which is attached. The terms

[2] Corrected in the later version of the side letter to read P00025.

> and conditions of which have been agreed to by Freedom and DPSC. (emphasis added)

(Appendix F, pp. 115a-119a).

The testimony of FNY's President further clarifies this issue. During the trial the following interchange described the situation at the time that Modification 25 was executed:

> Q. Are you saying the original version of this letter was addressed to Mr. Bankoff?
> A. Yes. It was addressed to Bankoff. But since Bankoff had referred the whole thing up the [*sic*] DLA headquarters for resolution, . . . then Mr. Apellean says, that this was negotiated by the highest person at DLA in Contracting who had authority to do something here . . .[and] that this document should be attached to the modification and then handed to the PCO as one document. (emphasis added).

(Appendix D, p. 101a).

Although the court below had the rule right, it erred in its application of the rule to the side letter. Properly construed, the integrated document here consisted of both the side letter and Modification 25.

When a court interprets contract language, it should initially attempt to reach the meaning that would be reached by a "reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with making the written instrument" *17 Am. Jur. 2d § 243 (2d Ed. 1964)*. If this rule is applied to the question of what documents constituted Modification 25, the answer is immediately obvious.

Without the detail and additional conditions imposed by the side letter, Modification 25 is nothing more than a unilateral release by FNY of its claim against DLA with minimal consideration from DLA. It is only when the two documents are read together that they make sense from either a business or logical viewpoint. The court below had an obligation to interpret Modification 25, "in a manner that gives meaning to all its provisions and makes sense." *McAbee Const. Inc. v. U.S. 97 F. 3d 1431, 1435 (Fed. Cir. 1996).* And, as the Supreme Court has observed "business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." *N .German Lloyd v. Guar. Trust Co., 244 U.S. 12, 24 (1917).*

Finally, the court below should have considered the practical approach taken in another contract dispute where a court observed that if, "language of a contract is open to an interpretation which is reasonable and in accordance with the general purpose of the parties, the hardship of a different interpretation is strong ground for belief that such a meaning was not intended." *Sorenson v. J.H. Lawrence Co., 79 A. 2d 382 (Md. 1981).*

Unfortunately, here the court allowed itself to be swayed by the after-the-fact disavowal of an individual whose honesty had been entirely discredited by the trial Judge who personally observed his testimony.

3. THE FEDERAL CIRCUIT'S DECISIONS WOULD CREATE CONFUSION AND UNCERTAINTY WITHIN THE RANKS OF GOVERNMENT CONTRACTORS AND WOULD BE ESPECIALLY HARMFUL TO SMALL BUSINESSES THAT LACK THE RESOURCES TO CONTEST ARBITRARY GOVERNMENT ACTIONS.

Contractors doing business with the government are entitled to a reasonable degree of certainty that their contract disputes will be resolved by the consistent application of rules of review. The standard of review by an appellate court of a board of contract appeals' finding of fact is a critical element of this review process and it has had a lengthy history of virtually uniform treatment.

If the federal circuit's unexplained deviation from these established norms is allowed to stand, contractors - especially small businesses without the resources needed to retain legal counsel - would be faced with uncertainty and with the likelihood of significant expenditures that they can ill afford.

The Council is particularly concerned that small business owners, particularly its membership, who are trying to follow the Congressional mandate to bring federal government business and jobs to Historically Underutilized Business Zones, and who do not have the sophistication and resources of some larger government contractors, may be seriously disadvantaged if they cannot rely on the judicial and administrative forums to resolve disputes in an orderly and consistent manner.

CONCLUSION

The Council has demonstrated the several instances in which the federal circuit plainly and materially erred in its review of the ASBCA's decision.

The Council joins petitioner in urging that the Petition for Issuance of a Writ of Certiorari be granted and agrees with petitioner's suggestion that this court might choose to reverse the decision below summarily in view of

the federal circuit's disregard of this Court's decision in *Anderson v. City of BessemerCity,* 470 U.S. 564 (1985).

Respectfully submitted,

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